IN THE

Supreme Court of the United States

OCTOBER TERM, 1952.

No. 70.

ALGONQUIN GAS TRANSMISSION COMPANY and TEXAS EASTERN TRANSMISSION CORPORATION, *Petitioners,*

v.

NORTHEASTERN GAS TRANSMISSION COMPANY, TENNESSEE GAS TRANSMISSION COMPANY, FEDERAL POWER COMMISSION, BLACKSTONE VALLEY GAS AND ELECTRIC COMPANY and FALL RIVER GAS WORKS COMPANY, *Respondents.*

PETITION OF ALGONQUIN GAS TRANSMISSION COMPANY AND TEXAS EASTERN TRANSMISSION CORPORATION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Comes now Algonquin Gas Transmission Company and Texas Eastern Transmission Corporation, Petitioners above named, and pray that this Court grant rehearing of its order of October 13, 1952, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the four judgments of the Court of Appeals for the Third

Circuit which were entered on April 4, 1952, all as prayed for in the petition for writ of certiorari filed May 17, 1952, herein.

Reasons for Granting Rehearing and Issuing the Writ.

1. The fundamental issues presented by Petitioners in their request for certiorari concerns an interpretation of Sections 7(c) and 7(e) of the Natural Gas Act (15 U.S.C. Section 717f(c) and (e)) and the application of two decisions of this Court, *Ashbacker Radio Corporation* v. *Federal Communications Commission*, 326 U. S. 327 (1945) and *Civil Aeronautics Board* v. *State Airlines, Inc.*, 338 U. S. 572 (1950).

It is our contention that all that the *Ashbacker* case decided was that ". . . where two *bona fide* applications are mutually exclusive the grant of one without a hearing to both deprives the loser of the opportunity which Congress chose to give him." In order to apply this principle in a reasonable and practicable manner, certain agencies had, at the time of the filing of the petitions for certiorari, either promulgated certain rules relating to hearing procedures or refused to extend the principle of the *Ashbacker* case where to do so would make it impossible for the agency to dispose properly and fairly of applications submitted to them for consideration and disposition. Federal Communications Commission Rule 1.387(b); *West Coast Case* (C.A.B.), 8 C.A.B. 636 (1947); *American Power & Light Co.* v. *Securities and Exchange Commission*, 329 U. S. 90 (1946). See also: *Big Sioux Broadcasting Co.*, 12 F.C.C. 146 (1947); *Southwest-West Coast Merger Application*, 3A Pike & Fisher Ad. Law 48g, 14-1 (C.A.B. 1950); *Southwest Renewal-United Suspension Case*, 2 Pike & Fischer Ad. Law (2d) 98 (C.A.B. 1952); and *Kentucky Broadcasting Corp.* v. *Federal Communications Commission*, 174 F. 2d 38 (D. C. Cir. 1949).

At the time of the filing of the joint petition for certiorari, the Federal Power Commission had before it for con-

sideration and approval a proposed revision of its Rules and Regulations, public notice of which was first given on March 14, 1951, and supplemented over a year later on May 14, 1952. Due to the fact that the proposed amendments were pending for some time without formal enactment thereof, Petitioners did not make reference to or rely upon such proposed amendments. However, subsequent to the filing of Petitioners' petition the Commission, on July 28, 1952, formally adopted its Order No. 163 amending its Rules and Regulations, to become effective September 15, 1952.[1] Section 157.11 of the new Rules states the following:

> "§ 157.11 *Hearings*—(a) *General.* The Commission will schedule each application for public hearing at the earliest date possible giving due consideration to statutory requirements and other matters pending, with notice thereof as provided by § 1.19(b): *Provided, however,* That when an application is filed less than fifteen days prior to the commencement of a hearing theretofore ordered on a pending application and seeks authority to serve some or all of the markets sought in such pending application or is otherwise competitive with such pending application, the Commission will not schedule the new application for hearing until it has rendered its final decision on such pending application, except when, on its own motion, or on appropriate application, it finds that the public interest requires otherwise."

If the rule quoted above were in effect at the time of the issuance by the Commission of its Opinion No. 202 (R. Vol. 1, pp. 94-133) and assuming the same state of facts namely, the untimely filing of a second application by a competitor for a portion of market area which has already been the subject of a hearing on competitive applications consolidated for hearing, the Commission's disposition of such second application would have accorded with the letter and spirit of such rule.

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[1] Code of Federal Regulations, Title 18, Chapter 1, subchapter E. ing:

By its denial of certiorari thus permitting the judgments of the court below to remain undisturbed, the validity of the new regulation referred to above, as well as others of a similar nature (Federal Communications Commission Rule 1.387(b)), is not only open to question but the effect of such denial is to extend the doctrine of the *Ashbacker* case beyond the good faith interpretations which the administrative agencies of the government have applied in administering their powers. The denial of certiorari is not only of importance to Petitioners and the Commission. Its importance actually goes far beyond the particular parties and the thousands of gas consumers involved in the instant case. The planning, the treatment and the disposition of similar matters affect the various administrative government agencies and large segments of the people of the country who depend on such agencies to provide workable means of bringing to the general public, through their consideration and expeditious handling of applications, the relief and benefits requested.

If the statutory hearing requirement compels a hearing on the second application of respondent under the unusual circumstances surrounding such filing, as held by the court below, it is obvious that, regardless of the notice of and adequate opportunity for hearing provided for in this case, the result of the decision of the court below would be to strike down all the safeguards that have been imposed by administrative agencies to bring about fair play with respect to the filing of bona fide applications.

2. The main pipeline of Petitioner Algonquin Gas Transmission Company from New Jersey to a point near Boston is 99.9% installed, many of its lateral lines are completed and the balance can be finished in November. As of October 14, 1952, said Petitioner has expended approximately $44,693,752.00 on such construction. During the period from the commencement of construction to date it has issued and sold Bonds in the principal amount of $37,334,000 and common stock in the amount of $14,066,000.

Bond interest charges alone amount to approximately $1,500,000.00 annually. Such investments should not be endangered by permitting a radical or improper departure from the principles established by this Court in the *Ashbacker* and *State Airlines* cases, or by nullifying established and reasonable hearing procedures before administrative bodies with resulting injury to the general public.

3. PUBLIC IMPORTANCE.

This Court has always been careful in its review of administrative orders to consider the public interest of paramount importance. In the instant case if the decision of the court below is undisturbed the result is confusion as to the powers which administrative agencies may exercise, either by decision or by rule, with respect to hearing procedures. This confusion and this apparent conflict are more inimical to the orderly progress of a republic with complementary authorities, than are conflicts of decisions between circuits on legal matters of a purely private nature. Notwithstanding this Court's frequent admonition that a denial of certiorari is not to be taken as an affirmance of the legal principles stated in the lower court's opinion, nevertheless, such lower court opinion would stand as the latest authoritative pronouncement upon this Court's concept of administrative hearing procedures where competitive applications are involved. There would be a harmful beclouding of this Court's concept and rulings with respect to the issues raised and decided in the *Ashbacker* and *State Airlines* cases.

The Commission found as a fact, supported by substantial evidence, that "all of the matters involved and issues presented" in Respondent Northeastern's dismissed application "have been determined by the Commission's" prior decision. The Commission also found as a fact, supported by substantial evidence, that the markets involved in the dismissed portion of Respondent Northeastern's second application "either were included in the certificate

issued to Northeastern, * * * [were] denied [Northeastern] by the Commission's order issued November 8, 1950, * * * or * * * were reserved to Algonquin upon a showing by the latter * * * that it has an adequate gas supply therefor" (R. 65-66, 64, 688a). These findings—which were ignored by the court below—are the very basis for the application by the Commission of the principle of fairness as exemplified by this Court in its opinions in the *Ashbacker* and *State Airlines* cases. To extend unduly the doctrine of the *Ashbacker* case and to restrict the principle of the *State Airlines* case as the lower court has done would result in removing from administrative bodies hearing powers they must possess in order to effect practical, reasonable and fair hearing procedures contemplated by this Court. The lower court's decision, if permitted to stand, would be a serious hindrance to effective administration of applicable law by Federal administrative agencies.

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We, Charles E. McGee and David T. Searls, counsel for the above-named Petitioners, do hereby certify that the foregoing petition is presented in good faith and not for the purpose of delay.

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DAVID T. SEARLS.

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HAROLD B. WILLEY, Clerk

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RESPONSE TO PETITION FOR REHEARING OF ORDER DENYING PETITION FOR CERTIORARI.

November 3, 1952

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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other "substantial grounds available to petitioner although not previously presented." Moreover, counsel for Algonquin and Texas Eastern have not certified, as required by Rule 33, that the petition is restricted to such grounds.

In their instant petition for rehearing Algonquin and Texas Eastern merely reiterate the contentions which they advanced in their petition for certiorari, including their erroneous contention (Pet. 3, 4, 12, 13, 15, 18, 19, 20, 21, 22-26, 28) that the decision below represented an undue extension of the *Ashbacker* case (326 U. S. 327) and an undue restriction of the *State Airlines* case (338 U. S. 572).

While the petition for rehearing refers to the securities which Algonquin has sold, this matter was fully stated in the petition for certiorari (p. 11) and in the motion which Algonquin and Texas Eastern thereafter filed for a stay of the issuance of the order denying certiorari, which this Court denied on October 20, 1952.

In this connection it should be noted that, following the entry of the opinions and judgments below, Northeastern and Tennessee filed a motion in the lower Court seeking to prevent Algonquin from continuing with its construction (R. Vol. VII, p. 1596). Algonquin opposed this motion and in so doing assured the Court below that it "is continuing such work at its own risk and with knowledge of the provisions of Section 7(c) of the Natural Gas Act" (R. Vol. VII, p. 1624).

It is therefore respectfully submitted that the instant petition for rehearing is without merit and should be denied.

Respectfully submitted,

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